Supreme Court, U. S.
FILED
JUN 26 1978
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1977

No. 77-1830

JAMES HASKIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. .....

JAMES HASKIN,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To: The United States Supreme Court, October Term, 1977:

The petitioner, James Haskin, prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit, filed March 29, 1978, affirming the judgment of the United States District Court for the Central District of California, which found the petitioner guilty on three misdemeanor

counts of violation of Title 26 U.S.C. § 7203.

OPINION BELOW

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit was filed March 29, 1978. A copy of that memorandum opinion appears in the appendix hereto as Appendix "A" (Appendix pp. 1 - 7). No opinion was rendered by the United States District Court for the Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 29, 1978, affirming the petitioner's conviction on three counts of violating Title 26 U.S.C. § 7203. A copy of the judgment, in letter form, obtained from the Office of the Clerk, United States Court of Appeals for the Ninth Circuit, appears in the appendix as Appendix "B" (Appendix p. 8). A timely petition for rehearing and suggestion for rehearing *en banc* was denied by order filed May 25, 1978. A copy of that order appears in the appendix hereto as Appendix "C" (Appendix p. 9). The Court's jurisdiction is invoked pursuant to Title 28 U.S.C. § 1254(1) and Rule 22(2).

QUESTIONS PRESENTED

1. What standard must be utilized under the Sixth Amendment to judge the competency of the assistance of counsel rendered to a criminal defendant?

2. Whether a corporate officer may be criminally liable for failure to file a corporate income tax return under 26 U.S.C. § 7203 based solely upon his status as such corporate officer?

3. What is the appropriate standard to be applied in a federal criminal case to determine whether reversible error exists in a situation in which a government prosecutor argues to the jury based upon his personal belief and upon matters outside the record?

4. Whether the requirements of Federal Rules of Evidence, Rule 803(10), concerning the absence of a public record, and the requirements of the Sixth Amendment right to confrontation of witnesses, are satisfied through an appellate finding of "reliability" but without any opportunity to cross-examine the ultimate government source of the hearsay information?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment VI to the United States Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense."

Pertinent portions of the following statutory provions appear in Appendix "D" (Appendix pp. 10 and 11).

26 United States Code § 7203;

26 United States Code § 7215;
26 United States Code § 7343.

STATEMENT OF THE CASE

The petitioner was charged before the United States District Court for the Central District of California in a three-count indictment filed March 14, 1977. Each count charged a violation of Title 26 U.S.C. § 7203, a misdemeanor. Counts I, II and III contained identical language, charging the petitioner with the failure to file a corporate income tax return for the Ecktagraphics Corporation on or before March 15, 1971, 1972, and 1973, respectively. Following trial by jury, a judgment of conviction on each of the three counts was entered on June 7, 1977. The petitioner was sentenced consecutively on each count, receiving the maximum one-year confinement on Counts I and II, together with a $10,000 fine on each count, and probation as to Count III, together with a $10,000 fine. The petitioner's sentence, therefore, consists of a period of confinement for two years and fines totaling $30,000.

A timely appeal was taken to the United States Court of Appeals for the Ninth Circuit, which court, on March 29, 1978, entered its judgment affirming the conviction on each count. A timely petition for rehearing was denied by the court pursuant to order entered May 25, 1978.

The facts produced before the District Court demonstrate that the petitioner, during the relevant years, was the president of Ecktagraphics Corporation, a Nevada corporation, with its principal place of business in Los Angeles. Ecktagraphics, which had previously been called Intergraphics,

had filed a 1968 fiscal year return. The evidence demonstrated that Haskin was responsible for hiring a C.P.A. in order to get the books and records of the corporation in order. The accountant, however, dealt exclusively with one Jerald Lynn, and discussed the tax situation with Lynn. These matters were not discussed with the petitioner. Evidence was introduced with regard to the petitioner's powers as president, including his ability, along with others, to sign checks and hire employees.

The defense consisted primarily of demonstrating that Lynn was in charge of the day-to-day business activities of the corporation, and that the petitioner did not involve himself in this portion of the corporate activity. It was established, therefore, that Lynn set up a computer system to keep track of the finances of the corporation, and that only Lynn and one of his subordinates utilized the computer. Lynn was eventually fired from the corporation, and at that time it was discovered that various employment tax checks, printed by the computer, had not been forwarded to the government and that other checks, representing payments to corporate creditors, had similarly not been paid but had been retained in Lynn's desk drawer.

During the course of both the government's and the defense's presentation, witnesses, while being questioned by the government representative, testified largely without defense objection that Haskin was purportedly "skimming" from the corporation. The only objection interposed by defense counsel was to the effect that the question was "leading" and "assumed a fact not in evidence." The only evidence which purported to establish such skimming was introduced through the testimony of one Richard Winans,

which consisted entirely of a recitation of a conversation purportedly had between Winans and another individual by the name of William Beal. Beal ultimately testified that he had had no such conversation with Winans. A great deal of other damaging hearsay testimony came in without defense objection, including testimony concerning the petitioner's life style and his ownership of a boat and a plane.

Furthermore, the government attorney repeatedly asked a variety of witnesses concerning the business of Ecktagraphics Corporation. Without objection, these witnesses were permitted to testify that the business related to "pornographic books." In fact, one defense witness was questioned without objection concerning her present employment in a pornographic outlet, although that business had no relationship to this petitioner.

The evidence concerning skimming and the alleged pornographic activities of the petitioner were argued to the jury as a basis for finding that the petitioner was the person responsible for filing taxes. Although the Court of Appeals determined that the evidence was irrelevant and should not have been admitted, it refused to find reversible error in the absence of a defense objection. (Appendix p. 3.)

During the course of the defense, the District Court excluded various business records of Ecktagraphics Corporation based upon its determination that the witness had not been the custodian of the records at the time the documents had been executed. Although the Court of Appeals agreed with the petitioner's contention that exclusion is not justified merely because the witness was not the custodian at the time of the execution of the documents, the court found that the petitioner's counsel had failed to make a

requisite offer of proof as to the relevance of the excluded evidence. (Appendix p. 2.)

During closing argument, the prosecutor made assertions of his personal belief based upon matters not in evidence. The Court of Appeals found no reversible error, stating that "[n]o objection was raised." (Appendix p. 4.)

REASONS FOR GRANTING A WRIT

I

The Various Circuit Courts Of Appeals, And The Various Panels Within The Ninth Circuit Court Of Appeals, Are In Complete Disarray On The Issue Of The Appropriate Standard To Be Applied To A Question Of Whether A Criminal Defendant Has Received The Effective Assistance Of Counsel.

The right to counsel has long been recognized as a fundamental right. *Gideon v. Wainwright*, 372 U.S. 335 (1963). And, indeed, perhaps no other right is as essential to insure that a criminal defendant receives the full panoply of rights guaranteed to him by the United States Constitution. It is somewhat surprising, and disconcerting, to realize that the various circuit courts of appeals demonstrate no consistency as to the appropriate standard to be applied to a denial of this right. *Compare United States v. Madrid Ramirez*, 535 F.2d 125 (1st Cir. 1976); *Gillihan v. Rodriquez*, 551 F.2d 1182 (10th Cir. 1977); *United States Ex Rel. Williams v. Twomey*, 510 F.2d 635 (7th Cir. 1975), *and United States v. Easter*, 539 F.2d 663 (8th Cir. 1976). Although the matter appears to be presently under *en banc* consider-

ation in the Ninth Circuit pursuant to the grant of hearing in *Cooper v. Fitzharris,* 551 F.2d 1162 (9th Cir. 1977), the most recent *en banc* consideration in this circuit purports, itself, to offer a variety of standards. *See de Kaplany v. Enomoto,* 540 F.2d 975, 987 (9th Cir. 1975). The court below in fact quoted the three standards of *de Kaplany v. Enomoto, supra,* (Appendix p. 4) and apparently purported to apply the standard of the panel opinion in *Cooper v. Fitzharris, supra,* that counsel rendered "reasonably effective assistance." (Appendix p. 4.)

The present case presents an appropriate vehicle for discussion of this issue for a variety of reasons. First, unlike the overwhelming majority of cases upon this issue, the errors of counsel in this case may be analyzed with regard to discreet portions of the record and without the necessity of reference, at this state, to either the entire record or to matters concerning the general preparation of the case. See cases cited in *de Kaplany v. Enomoto, supra.*

Moreover, the opinion of the court below clearly resolves a series of issues raised by the petitioner in the petitioner's favor, but finds that it either cannot consider the issues as a result of the failure of the counsel to object or finds that the failure to object imposes a higher standard of review. Thus, irrelevant, highly inflammatory and hearsay evidence was admitted concerning alleged "skimming" operations of the petitioner and concerning the "pornographic" nature of the petitioner's business, and while the Court of Appeals' opinion recognizes that the evidence regarding "skimming" was irrelevant and that the "gratuitous insinuation" of the word "pornography" into the trial was "unworthy of a government lawyer" (Appendix p. 3), the court concludes:

> "An error requiring reversal might have been presented if defense counsel had objected at the time the government insinuated the foreign matter." (Appendix p. 3.)

The court similarly finds that assertions of personal belief by the prosecutor concerning matters not in evidence were not reversible error as "[n]o objection was raised." (Appendix p. 4.)

Finally, the court below, in agreeing with the petitioner's contention that various business records should not have been excluded upon the ground that the custodian of the records at the time of trial was not the custodian at the time the various documents were made, finds that the relevancy of the documents was never established, as a result of the failure of petitioner's trial counsel to make the requisite offer of proof. (Appendix p. 2.) The court concludes that "[i]f Haskin had a valid foundation for the documents, he neglected to make it." (Appendix p. 2.)

It is consequently submitted that it is absolutely essential that this Court quiet the uncertainty surrounding the appropriate standards to be applied to a denial of effective assistance of counsel and that the instant matter is an appropriate case for making that determination. This is especially so in view of the recognized principle that once denial of effective assistance of counsel has been determined, the harmless-error standard does not apply. As stated in *Glasser v. United States,* 315 U.S. 60, 76:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indluge in nice calculations as to the amount

of prejudice arising from its denial."

II

The Provisions Of Title 26, United States Code § 7203 Cannot Rationally Or Legally Be Applied To A Corporate Officer Solely Based Upon His Status As Such An Officer.

The case presented to the District Court by the government was largely based upon the assertion that Haskin, as president of Ecktagraphics, was criminally responsible for a corporate failure to file a tax return based primarily upon his position in the corporation. The possible crippling effect of such a rule upon the operation of all but the smallest corporate businesses in the country is apparent. A corporate officer cannot possibly become personally involved in each of the day-to-day activities of the corporation, and yet, the holding of the Ninth Circuit below would appear to require him to do so at his criminal peril.

The basis for attaching liability under § 7203 to this petitioner arises solely from the provisions of Title 26, U.S.C. § 7343 which defines the "person" as used in Chapter 75 of that title as including "an officer . . . of a corporation . . . who as such officer . . . is under a duty to perform the act in respect of which the violation occurs." On at least two separate bases, however, that section does not make the provisions of § 7203 applicable to this petitioner.

First, § 7343 applies only to such officer who is under a "duty to perform the act" in question. Of necessity, the term "duty" must be related to some other statutorily imposed duty. In contrast to sections involving civil penalties,

where such a "duty" is specified, no such duty is detailed with regard to the criminal corporate filing sections.

Furthermore, § 7203 applies only to "any person *required under this title* to . . . make a return" (emphasis added). That language leads one directly to the provisions of Title 26, U.S.C. § 6012 entitled "Persons Required To Make Returns Of Income." That section requires the returns to be made by "every corporation" but imposes no such responsibility upon the corporate officers.

Moreover, under somewhat parallel legislation, at least one circuit court of appeals has decided that the term "person" does *not* include corporate officers. Thus, in *Newsom v. United States,* 431 F.2d 742 (1970), the Fifth Circuit refused to extend the liability for taxes withheld or collected under 26 U.S.C. § 7501 to corporate officers.

Finally, unless the petitioner is correct in his analysis of the sections, a corporate officer has greater protection with regard to liability from civil tax collection actions than he does in criminal actions. For, under § 7215 of Title 26, U.S.C., in such civil collection actions, notice is required prior to the initiation of the lawsuit. In contrast, under the government's analysis, which appears to have been adopted by the court below, criminal liability may be imposed without knowledge or intent, and merely as a result of the individual status of the corporate officer.

III

A Conflict In The Circuit Courts Of Appeals Exists With Regard To The Standard To Be Applied To Prosecutorial Assertions Of Personal Belief And Argument To The Jury Based

Upon Matters Not In Evidence.

During the course of argument to the jury, the Assistant United States Attorney made various references to matters outside the record regarding the alleged extent of petitioner's activities and importuned the jury to adopt the government's case by continually utilizing the phrase "I think" while commenting on both the government and defense case. The court below announced that the rule of the Ninth Circuit is that "assertions of personal belief based on matters not in evidence constitute reversible error unless no objection is made. . . . No objection was raised [here]." (Appendix p. 4.) The court thus found no reversible error. (*Ibid.*)

As indicated by the court, the Ninth Circuit generally subscribes to the standard that assertions of belief based on matters not in evidence would constitute reversible error unless no objection is made or the prosecutor is attempting to rebut insinuations of defense counsel. *Orebo v. United States,* 292 F.2d 747, 749 (9th Cir. 1961); *Anderson v. United States,* 406 F.2d 1057 (9th Cir. 1969). However, while all circuits recognize that the prosecutor bears a special responsibility as a representative of the government (*Berger v. United States,* 395 U.S. 78, 88), the various circuit courts do not agree on the appropriate standard to measure prosecutorial expressions of personal belief. Thus, the First Circuit appears to have the strictest standard, requiring reversal whenever the prosecutor expresses his personal belief. *Patriarca v. United States,* 402 F.2d 314, 321 (1968); *Greenberg v. United States,* 280 F.2d 472 (1st Cir. 1960). The District of Columbia Circuit relies upon *Greenberg v. United*

States, supra, but requires that an objection be made. *Harris v. United States,* 402 F.2d 656 (1968). The Second Circuit applies the rule to those situations which indicate that the prosecutor was relying upon information other than that which had been presented in court. *United States v. Spanglet,* 258 F.2d 338 (1958). This appears to be the rule in the Fifth Circuit. *Gradsky v. United States,* 373 F.2d 706 (1967). The Eighth Circuit has held that "statements by counsel or the court are not cause for reversal unless prejudicial error is apparent." *United States v. Leach,* 429 F.2d 956 (1970). The Tenth Circuit, while recognizing such error, has determined to decide on a case-by-case basis whether the grounds for reversal exist. *Devine v. United States,* 403 F.2d 93 (1968).

The standards of prosecutorial behavior relate, of course, not only to the interest of the criminal defendants but also to the manner in which society at large views and may rely upon the responsibility of government officials and the judicial process. It is therefore of utmost importance that this Court take this opportunity to reaffirm the notions announced in *Berger v. United States, supra,* and to give appropriate guidance to the various circuit courts as to the standard to be applied.

IV

The Court Of Appeals Was Incorrect In Formulating An Ad Hoc Exception To The Hearsay Rule Based Upon An After-The-Fact Determination Of "Reliability."

The petitioner argued before the court below that the evidence produced at trial was insufficient as a matter of law

to establish the failure of Ecktagraphics Corporation to file the requisite income tax return. Obviously, if the petitioner had been successful upon this argument, an essential element of § 7203 would not have been demonstrated and the petitioner would be entitled to an acquittal. The government's evidence utilized to show failure to file a tax return was produced through one Keith Krouge, a representative of the Internal Revenue Service, whose jurisdiction extended throughout the states of California and Hawaii. Krouge's testimony established that he never requested a search to be made with regard to Ecktagraphics Corporation, a *Nevada corporation*, and that in fact the only search which he made was to request a computer printout from Washington concerning Ecktagraphics, a California corporation. The petitioner argued (1) that the failure to search for the Nevada corporation rendered Krouge's testimony incompetent to establish Ecktagraphic's failure to file, and (2) that the extent of Krouge's testimony was deficient to meet the requirements of Federal Rule of Evidence 803(10), concerning the absence of a public record.

The interpretation given to Rule 803(10) by the court below purports to remove the requirement that the custodian of the records testify as to such search. The court's interpretation imposes, in its place, a requirement only that the records in some unspecified manner be determined "reliable." (Appendix p. 7.) While the court, in its opinion, states rather blandly that "reliability was never seriously in question," the memorandum opinion overlooks the fact that the petitioner was asserting that the search which had been made did not go far enough in checking the filing status of the Nevada corporation. Only through appropriate cross-examination of the requisite

custodian could this requirement be satisfied. The Ninth Circuit's opinion, however, authorizes the non-custodian Krouge to testify to the results of a search made by some unidentified person. This approach is not only contrary to the historical background of Rule 803(10), which is based upon Federal Rules of Criminal Procedure, Rule 27 and Rule 44[1], but serves also to deprive criminal defendants of their effective right to cross-examination. It is indeed anomalous that the court is willing to view second-hand governmental in-channels information with the aura of reliability when the evidence is used as an element to convict a criminal defendant, in the face of the requirement that the ultimate source of such evidence must be subjected to cross-examination on the less stringent standard of probable cause to arrest. *Whitely v. Warden*, 401 U.S. 560 (1971).

CONCLUSION

This petition presents fundamental issues regarding a variety of questions which remain unsettled in the various circuit courts of appeals. These questions relate to the fundamental right of representation by counsel, and to the specialized duty of a prosecutor to the defendant, the court and to society. Furthermore, the petition presents a rather serious issue concerning the liability of corporate officers for a corporate failure to file tax returns, in the absence of knowledge or intent on their part. Finally, the petition raises an

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[1]Rule 44, which is incorporated in Rule 27, required a statement from the "officer having the custody of an official record." *Smith v. United States*, 353 F.2d 838, 844 (D.C. 1965).

issue concerning the propriety of judicial modification and substantial alteration of the Federal Rules of Evidence concerning utilization of governmental in-channels hearsay information to convict a criminal defendant.

Each of these matters may be decided upon limited portions of the record. And, each of thes. matters is raised in the context of a criminal defendant convicted of three misdemeanor offenses and, as a result of such convictions, facing two years imprisonment, $30,000 in fines, probation and restitution. The issues are obviously substantial to the petitioner. It is submitted, moreover, that the issues are extremely important to the administration of justice and to the conduct of the judicial system.

For each of these reasons, it is respectfully requested that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX "A"

MEMORANDUM OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Appellee, v. JAMES HASKIN, Appellant.

No. 77-2410.

[FILED MARCH 29, 1978]

Appeal from the United States District Court for the Central District of California.

Before: TRASK and GOODWIN, Circuit Judges, and SOLOMON*, District Judge.

James Haskin was convicted on three counts of failure to file income tax returns on behalf of a corporation, Eckta-graphics, of which he was president and sole owner.

On appeal, Haskin argues that some of his business records were improperly excluded and that prejudicial testimony, ineffective representation, misconduct of the prosecutor, and a lack of impartiality by the court require reversal.

Haskin also asserts that the government produced insufficient evidence to prove: (1) that the corporation was required to file a "calendar year"return, (2) that Haskin was a person required to file these returns, (3) that his conduct was willful, and (4) a failure to file. On these

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* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

points, the evidence was sufficient for the jury to reach the guilty verdict.

The business-records exclusion followed a ruling by the trial court which interpreted Fed. R. Evid. 803(6) to require the witness to have been the custodian of the records, at the time the various documents were made, in order to qualify the records under the hearsay exception. In *C. S. Johnson Co. v. Stromberg,* 242 F.2d 793, 799 (9th Cir. 1957), *cert. denied,* 355 U.S. 816 (1957), under the predecessor to Fed. R. Evid. 803(6), 28 U.S.C. § 1732(a), we held otherwise. It is not necessary to produce someone who was working at the business when the documents were prepared, so long as authenticity is otherwise established.

In the instant case, however, the relevancy of the documents was never established. Moreover, there was no foundation for many of the exhibits, and no reason to believe that others had been prepared in the regular course of business.

The purpose of introducing the excluded documents was to show that one Jerry Lynn, an employee, was responsible for taxes. The jury heard testimony to this effect. The exclusion of the documents, under all the circumstances, was not error. If Haskin had a valid foundation for the documents, he neglected to make it.

Haskin argues that questions to witnesses about "skimming", and other remarks by the prosecutor that his business was related to pornography or "adult" literature, and questions about the income of the business were irrelevant and so highly prejudicial as to require a reversal. There was no evidence that Haskin engaged in other illegal activity either with respect to pornography or personal tax evasion.

The government explains that the prosecutor's questions

about the nature of Haskin's business and possible use of corporate receipts for personal purposes was necessary to prove Haskin's total control of the business, to attack the credibility of a defense witness, and to show that Ecktagraphics and not some related corporation was indeed doing the business which generated the income for which a tax return was due.

Testimony about "skimming" was irrelevant to the issue of whether corporate tax returns had been filed or who was responsible for filing them. The gratuitous insinuation of the word "pornography" into the trial was the sort of pettifogging that is unworthy of a government lawyer. An error requiring reversal might have been presented if defense counsel had objected at the time the government insinuated the foreign matter. However, Fed. R. Evid. 103(a) (1) forecloses the assignment of error on appeal when the point was not raised on trial. Had the point been raised, we assume that the trial court could have made the necessary corrections on the spot. The error, if any, was not so prejudicial as to be plain error which we might notice on appeal even though not raised in the trial court.

An exchange between the IRS agents and Haskin's attorney does not show the invocation of a Fifth Amendment claim. The agents were attempting to obtain business records from Haskin. He had no privilege as to these records. *United States v. White,* 322 U.S. 694, 699 (1944), *Wilson v. United States,* 221 U.S. 361, 380-8 (1911).

Haskin now argues that because "irrelevant, highly inflammatory, and hearsay" evidence was admitted, largely without defense objection, and because certain evidence proffered by the defense was excluded, he received ineffective

representation by counsel. He had constitutionally adequate counsel. The trial was not perfect, but it was fair.

In *de Kaplany v. Enomoto,* 540 F.2d 975, 987 (9th Cir. 1975), we noted the various standards by which appellate courts measure the conduct of counsel: (1) was the performance so poor and incompetent as to make the trial a farce or mockery of justice?, or (2) do the circumstances show a denial of fundamental fairness?, or (3) does the record show a lack of effective aid in the preparation and trial of the case?

Counsel in this case was able to render and did render reasonably effective assistance. This was far from a model trial, but the errors and omissions of counsel, if any, underscore the efficacy of hindsight. They do not rise to a denial of due process.

Haskin argues that the introduction of prejudicial evidence, combined with highly inflammatory presentations of personal belief or knowledge by the prosecutor in the final argument, amounted to reversible misconduct.

The rule in this circuit is that assertions of personal belief based on matters not in evidence constitute reversible error unless no objection is made. *Orebo v. United States,* 293 F.2d 747, 749 (9th Cir. 1961), *cert. denied,* 368 U.S. 958 (1962). However, the prosecutor can argue inferences to the jury based upon the evidence. *United States v. Parker,* 549 F.2d 1217, 1221, 1222 (9th Cir. 1977). Here the prosecutor stated, "This is a big business, that Mr. Haskin was running, a big business. Only a portion of it is reflected here.", and at various times used the phrase "I think" while commenting on the evidence. No objection was raised. The court later instructed that statements of counsel

are not to be considered as evidence. We find no reversible error here.

Haskin claims the court was not impartial. On balance we cannot say that because the trial judge was sometimes short with defense counsel the case must be reversed. The court was sometimes abrupt with both counsel. We noted in *United States v. Schmitz,* 542 F.2d 782 (1976),"Canon 3A(3) of the Code of Judicial Conduct says: 'A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity * * * '." 542 F.2d at 785. Here there is no reason to say that the judge's conduct did not meet that standard.

Haskin says that time is an essential element of an indictment in a § 7203 criminal action. This is true. Haskin then relies on the Intergraphs Corporation (a related company) fiscal return to show that the indictment was invalid.

Title 26, U.S.C. § 441(g) reads in part:

> "[T]he taxpayer's taxable year shall be the calendar year if –
>
> (1) the taxpayer keeps no books;
>
> (2) the taxpayer does not have an annual accounting period; or
>
> (3) the taxpayer has an annual accounting period, but such period does not qualify as a fiscal year."

The jury heard evidence that the books were inadequate or insufficient for Ecktagraphics Corporation to have the privilege of the option.

Haskin argues that there was no evidence to prove the element of willfulness. Under *United States v. Hawk,* 497 F.2d 365, 368 (9th Cir. 1974), *cert. denied,* 419 U.S. 838

(1974), the standard of willfulness in § 7203 actions does not include an independent element of bad purpose or evil motive. It is sufficient that there is proof of conscious wrongdoing rather than mere carelessness or mistake. If the notion of *mens rea* is adequately conveyed, instructions to include the terms bad purpose or evil motive may be rejected. Here evidence was introduced to show that Haskin had stated he would pay all taxes, that he had been made aware tax returns had not been filed, and that he knew of a duty to file. The jury could conclude that his failure to file was willful.

Haskin argued at trial that the employee Lynn was the "person required" to file the corporate income tax returns and that the government never proved Haskin was required to file the returns. In this court he assumes that his position as corporate president was the sole basis of the prosecution's case. But there was more.

We have defined the "person" responsible for the payment of the tax as that individual who "had the final word as to what bills should or should not be paid, and when." *Dudley v. United States*, 428 F.2d 1196, 1201 (9th Cir. 1970) (action to recover funds collected by Internal Revenue Service), *quoting from Wilson v. United States*, 250 F.2d 312, 316 (9th Cir. 1958). "Final" means significant rather than exclusive control. *Turner v. United States*, 423 F.2d 448, 449 (9th Cir. 1970). Haskin had total control.

Haskin argues that we should follow the reasoning in *United States v. Fago*, 162 F. Supp. 125, 129 (W.D. N.Y. 1958), that where there are other officers the government must show that the defendant is the one responsible. Whether or not we might agree with that abstract proposition, the jury

verdict can survive. The jury heard testimony that the employee Lynn was just a figurehead; that Haskin had final authority; and that Haskin ran the operations and negotiated business deals. The jury may well have inferred that Haskin knew that Lynn and Cornell (another employee) would never file the required returns without Haskin's approval, even though they were supposedly responsible.

The final issue is whether there was sufficient evidence of a failure to file a return. The testimony of the IRS investigator showed that two employer identification numbers were searched. Haskin says this is hearsay. The important point of the hearsay exception is reliability. Here the investigator could request information from the Federal Records Center and Archives and the National Computer Center. The government made an explanation of how a diligent search is conducted. We can discern no reason to have the person who actually ran the computer testify. Reliability was never seriously in question. The investigator's evidence was admissible under Fed. R. Evid. 803(10). It was up to the jury to give it such weight as it deserved.

Haskin's other contentions are without merit.

Affirmed.

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NOTICE OF ENTRY OF JUDGMENT

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Please take notice that the judgment was filed and entered in the case noted on the attached disposition (opinion, memorandum or order). Also, please take special notice of the date of filing as it represents the date of entry of judgment.

Important Time Periods

There are fourteen (14) days from the date of entry of judgment in which to file a petition for rehearing. The mandate of the court shall issue twenty-one (21) days after the entry of judgment unless the court orders otherwise. If the court enters an order denying the petition, the mandate will issue (7) days thereafter. For further information regarding these processes, please refer to Rules 36, 40 and 41 of the Federal Rules of Appellate Procedure.

†

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Appellee, JAMES HASKIN, Appellant.

No. 77-2410.

[FILED MAY 25, 1978]

Appeal from the United States District Court for the Central District of California

Before: TRASK and GOODWIN, Circuit Judges, and SOLOMON*, District Judge.

On April 11, 1978, appellee filed its petition for rehearing and suggestion for rehearing en banc.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

PERTINENT STATUTORY PROVISIONS

Title 26, United States Code

§ 7203. Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

§ 7215. Offenses with respect to collected taxes

(a) Penalty.—Any person who fails to comply with any provision of section 7512(b) shall, in addition to any other penalties provided by law, be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than one year, or both, together with the costs of prosecution.

§ 7343. Definition of term "person"

The term "person" as used in this chapter includes an officer or employee of a corporation, or a member or employee

of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

†

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on JUNE 22 1978, I served the within PETITION FOR WRIT OF CERTIORARI (HASKIN v. UNITED STATES OF AMERICA) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

Clerk, United States Court of Appeals
For the Ninth Circuit
Seventh and Mission Streets
P. O. Box 547
San Francisco, CA. 94101
Ref. 77-2410 - 1 copy

United States Attorney
312 North Spring Street
Los Angeles, California 90012
2 copies

Clerk, United States District Court
Central District of California
312 North Spring Street
Los Angeles, California 90012
1 copy

Solicitor General of the United States
U. S. Department of Justice
Washington, D. C. 20530
3 copies

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JUNE 22 1978, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Supreme Court, U.S.
FILED
SEP 28 1978
MICHAEL RODAK, JR., CLERK

No. 77-1830

In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES HASKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1830

JAMES HASKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his conviction for failure to file corporate income tax returns on the grounds that he was denied effective assistance of counsel, that a corporate officer cannot be convicted of failure to file a corporate return, and that the trial court improperly admitted certain evidence.

After a jury trial in the United States District Court for the Central District of California, petitioner was found guility on three counts of having failed to file corporate income tax returns for 1970-1972, in violation of 26 U.S.C. 7203. The district court sentenced him to consecutive one-year terms of imprisonment on the first two counts, a five-year period of probation on the third count, and imposed a fine of $10,000 for each of the three counts.

1. Petitioner contends (Pet. 7) that the courts of appeals are divided as to the correct standard to be applied in assessing a claim of ineffective assistance of counsel, asserting (Pet. 8) that this case "presents an appropriate vehicle for discussion of this issue * * *." But petitioner does not claim that the court of appeals applied an incorrect standard in this case or that a standard should have been applied that was more favorable to him. Indeed, the court of appeals applied the "reasonably effective assistance" standard which is more favorable to a defendant (see, *e.g.*, *United States* v. *Wright*, 573 F. 2d 681, 684 (C.A. 1)) than requiring him to establish that the conduct of his counsel made the trial "a farce or mockery of justice."[1] See, *e.g.*, *United States* v. *Bubar*, 567 F. 2d 192, 201-202 (C.A. 2), certiorari denied, 434 U.S. 872. Since the decision below held against petitioner under "a more lenient standard requiring 'reasonably competent assistance of counsel' " (*United States* v. *Madrid Ramirez*, 535 F. 2d 125, 129-130 (C.A. 1)), he would not prevail

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[1]Like the decision below, eight of the circuits have applied the "reasonably effective assistance" standard. See, *e.g.*, *United States* v. *DeCoster*, 487 F. 2d 1197, 1202 (C.A. D.C.); *Moore* v. *United States*, 432 F. 2d 730-736 (C.A. 3); *Coles* v. *Peyton*, 389 F. 2d 224, 226 (C.A. 4); *United States* v. *Fessel*, 531 F. 2d 1275, 1278 (C.A. 5); *United States* v. *Toney*, 527 F. 2d 716, 720 (C.A. 6); *United States ex rel. Williams* v. *Twomey*, 510 F. 2d 634, 640 (C.A. 7), certiorari denied *sub nom. Sielaff* v. *Williams*, 423 U.S. 876; *United States* v. *Easter*, 539 F. 2d 663, 666 (C.A. 8); *Cooper* v. *Fitzharris*, 551 F. 2d 1162, 1166 (C.A. 9), pending on rehearing *en banc*.

The remaining three circuits have adhered to the stricter standard that requires a defendant to establish that his trial was a "farce and a mockery." See, *e.g.*, *United States* v. *Wright*, 573 F. 2d 681, 684 (C.A. 1); *Rickenbacker* v. *Warden*, 550 F. 2d 62, 65-66 (C.A. 2); *United States* v. *Fitts*, 576 F. 2d 837 (C.A. 10). While some courts have considered the application of intermediate standards, see *de Kaplany* v. *Enomoto*, 540 F. 2d 975, 987 (C.A. 9), no standard other than "reasonably effective assistance" or "farce and a mockery" has gained general acceptance.

under either line of authority. See *deKaplany* v. *Enomoto*, 540 F. 2d 975, 987 (C.A. 9) (*en banc*). Accordingly, this case is not an appropriate vehicle for resolution of the conflict.

In support of his claim that he was denied the effective assistance of counsel, petitioner (Pet. 8-9) points to three instances at trial.[2] But as the court of appeals pointed out (Pet. App. 4), the right to effective assistance of counsel does not mean "errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance." *MacKenna* v. *Ellis*, 280 F. 2d 592, 599 (C.A. 5) (emphasis in original). Accord, *Cooper* v. *Fitzharris*, 551 F. 2d 1162, 1166 (C.A. 9). Here, while recognizing that "[t]he trial [in this case] was not perfect * * *," the court of appeals concluded that petitioner's counsel rendered "reasonably effective assistance" (Pet. App. 4). Since " '[a] defendant is entitled to a fair trial but not a perfect one,' for there are no perfect trials" (*Brown* v. *United States*, 411 U.S. 223, 231-232), quoting from *Lutwak* v. *United States*, 344 U.S. 604, 619), the court of appeals held that the conduct of petitioner's counsel was within " 'the range of

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[2]Petitioner contends (Pet. 8-9) that his trial counsel failed to object to the admission of certain hearsay evidence and to statements of personal belief, expressed by the prosecutor in closing arguments. The record shows that petitioner's counsel did make objections when they were appropriate (Tr. 17-19, 87, 90-93, 106, 126, 132-133, 282-283). Moreover, petitioner's claim (Pet. 9) that his counsel failed to establish a proper foundation for the admission of certain documents assumes that such a foundation existed. But the court of appeals properly refused to make such an assumption because it is not supported by the record (Pet. App. 2; Tr. 474-493, 504-512, 518-520). At all events, as the court of appeals concluded, the documents would have been cumulative of testimony already before the jury (*ibid.*). Thus, any errors and omissions of counsel did not prejudice the fairness of petitioner's trial (see Pet. App. 4).

competence demanded of attorneys in criminal cases.' " *Tollett* v. *Henderson,* 411 U.S. 258, 266-268, citing *McMann* v. *Richardson,* 397 U.S. 759, 770-771.

2. Petitioner further contends (Pet. 10-11) that he could be convicted of willfully failing to file corporate income tax returns because he was not a "person required * * * to make a return" under 26 U.S.C. 7203. Petitioner admits, however, that he was the president of the Ecktagraphics Corporation (Pet. 4) and does not challenge the conclusion of the court of appeals that he had "total control" (Pet. App. 6) over the corporation. Thus, since petitioner was an "officer" under 26 U.S.C. 7343, it was for the jury to resolve whether he was "under a duty to perform the act in respect of which the violation occurs." While petitioner sought at trial to shift responsibility for the filing of returns to an accountant employed by the corporation (Pet. App. 6-7), the jury heard testimony that the employee was merely a figurehead, that petitioner had "final authority" in the corporation, that he ran the operations and negotiated all of its business (Tr. 94, 114-115, 385; Pet. App. 6-7). There was accordingly ample evidence to support the verdict. See *Bloom* v. *United States,* 272 F. 2d 215, 221-223 (C.A. 9); *Lumetta* v. *United States,* 362 F. 2d 644, 647 (C.A. 8).

3. Finally, petitioner argues (Pet. 13-15) that inadmissible hearsay evidence was used to establish that Ecktagraphics Corporation had failed to file income tax returns for 1970-1972. The evidence in question was the testimony of an official of the Internal Revenue Service Center in Fresno, California. The IRS official testified that after requesting a transcript of two employer identification numbers from the National Computer Center in West Virginia, he received information that Ecktagraphics had filed an income tax return for its taxable year ending May 1969, but that the Internal Revenue Service had no record of Ecktagraphics having

filed returns for 1970-1972 (Tr. 146-157). Petitioner argues that this testimony did not comply with the requirements of the hearsay exception of Rule 803(10) of the Federal Rules of Evidence, and should have been excluded. That rule provides that whether or not the declarant is available, "the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form was regularly made and preserved by a public office or agency * * * [may be proved by] testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry."

Contrary to petitioner's assertion (Pet. 15), Rule 803(10) does not by its terms require the testimony of the "custodian" of the records in question. See *Jackson* v. *United States,* 250 F. 2d 897, 900-901 (C.A. 5). In this respect, it differs from Rule 803(6), which relates to the introduction of records of regularly conducted activity. Thus, the evidence that a diligent search was made was sufficient to admit the testimony of the IRS official that the Service had no record that Ecktagraphics filed returns for 1970-1972. As the court of appeals correctly concluded (Pet. App. 7), "[W]e can discern no reason to have the person who actually ran the computor to testify. Reliability was never seriously in question." See, *e.g., United States* v. *Harris,* 551 F. 2d 621, 622 (C.A. 5), certiorari denied, 434 U.S. 836; *Smith* v. *United States,* 353 F. 2d 838, 844 (C.A. D.C.), certiorari denied *sub nom. Cunningham* v. *United States,* 384 U.S. 910.[3]

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[3]Petitioner also contends (Pet. 12-13) that there is a conflict among the courts of appeals as to whether a prosecutor's improper statement to the jury of personal belief requires an objection by the defendant to constitute reversible error. But the results in such cases depend upon the probability of prejudice in the particular circumstances. See *Berger* v. *United States,* 295 U.S. 78, 88-89. Here, as the court of appeals concluded (Pet. App. 4-5), the district court's instruction to the jury that the statements of counsel were not evidence removed any possible prejudice resulting from the prosecutor's use of the phrase "I think."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1978.

DOJ-1978-09